

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-6013

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

B  
P/S  
Plaintiff-Appellant,

-against-

LEONE BOSURGI and EMILIO BOSURGI, As Executors of the  
Estate of ADRIANA BOSURGI, Deceased, CHEMICAL BANK,  
As Statutory Executor of the Estate of ADRIANA BOSURGI,  
Deceased, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD  
ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and  
BENEDICT GINSBERG,

Defendants-Appellees.

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On Appeal From The United States District Court  
For The Southern District of New York

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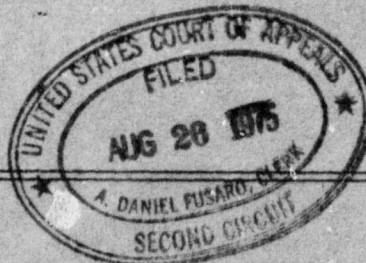
BRIEF OF DEFENDANT-APPELLEE CHEMICAL BANK NEW YORK TRUST COMPANY

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CRAVATH, SWAIN & MOORE,  
Attorneys for Defendant-Appellee  
Chemical Bank New York Trust Company  
One Chase Manhattan Plaza  
New York, New York 10005  
212-422-3000

JOHN R. HUPPER,  
PETER E. CALAMARI,

Of Counsel.



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#### PRELIMINARY STATEMENT

Plaintiff, the United States of America (the "Government"), appeals from the grant of summary judgment by the United States District Court for the Southern District of New York (Duffy, J.) dismissing its estate tax claims on the ground that the property, upon which the Government bases those claims, did not belong to the decedent, Adriana Bosurgi, but instead belonged to appellee, the Sociedad Anonima de Inversiones Comerciales e Industriales ("SAICI").

#### COUNTERSTATEMENT OF THE CASE

The sole predicate for the action brought by the Government against Chemical Bank New York Trust Company ("Chemical") is that Chemical, as an alleged statutory executor of the estate of Adriana Bosurgi, is liable for the failure of Adriana Bosurgi's estate to pay taxes on property held by Chemical in Adriana Bosurgi's name at the time of her death. If the property in Chemical's possession in fact belonged not to Adriana Bosurgi but to SAICI (as the Appellate Division of the New York State Supreme Court and the District Court of the Southern District of New York have found) then no estate tax is owed by Adriana Bosurgi's estate and consequently Chemical cannot possibly be liable for estate taxes as statutory executor or otherwise.

Certain basic facts in this action are essentially undisputed. In 1954, Adriana Bosurgi, an Italian national, opened a custodian account at Chemical in her name with powers of attorney in favor of her two sons, Leone and Emilio Bosurgi (A.\* 290). Early in 1963, Leone exercised his power, closed his mother's account and deposited the proceeds of that account in a new custodian account in his and his brother's name (A. 299).

In 1966, Leone and Emilio Bosurgi, represented by Benedict Ginsberg, commenced an action for damages against Chemical in New York State Supreme Court alleging, among other things, that in September of 1963 Chemical had made an unauthorized investment of securities on deposit in the account (A. 431).

The parties agreed to settle that action on September 15, 1970, by a stipulation of settlement which provided that Leone and Emilio Bosurgi were to receive \$215,000 from Chemical and Mr. Ginsberg was to hold that money in escrow pending the outcome of estate tax claims which had been

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\* References to the Appendix and briefs are abbreviated as follows:

"A" refers to the Appendix on Appeal;

"Gov. Br." refers to the brief of appellant the Government;

"Gins. Br." refers to the brief of appellee Benedict Ginsberg.



asserted by the Internal Revenue Service as a result of the death of Adriana Bosurgi in 1963 (A. 449). Mr. Ginsberg continues to hold the settlement fund in escrow pursuant to that stipulation and the subsequent orders of Judge Bonsal (A. 34) and Judge Duffy (A. 494).

On March 2, 1971, the Government commenced this action against Leone and Emilio Bosurgi as recipients of the proceeds of Adriana's estate (the settlement fund being the sole remaining asset) and against Chemical as an alleged statutory executor of the estate (A. 9).

On May 27, 1971, SAICI commenced an action in the New York State Supreme Court against Leone and Emilio, alleging that Adriana Bosurgi had held the Chemical custodian account as trustee for SAICI (A. 393). SAICI moved, in that action, for summary judgment based on an offer of documentary evidence (A. 374). That motion was denied and SAICI appealed. On appeal, the Appellate Division of the New York State Supreme Court reversed and ordered that summary judgment be entered in SAICI's favor (A. 194, 195).

Meanwhile, Chemical made SAICI a party in the Federal Court action and amended its answer in that action to reflect SAICI's claim of ownership (A. 101, 105).<sup>\*</sup> On

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<sup>\*</sup> The Government's claim that Chemical did not raise the issue of SAICI's ownership (Gov. Br. 4) is erroneous.

April 26, 1974, SAICI moved for summary judgment in the Federal action seeking possession of the settlement fund. SAICI asserted that, since Adriana Bosurgi was merely a trustee of the property in the Chemical custodian account, her death had no estate tax consequences with respect to that property. Chemical also moved for summary judgment on the ground that if SAICI succeeded on its motion, then it was obvious that Chemical Bank could not be liable as a statutory executor (A. 325). As evidence, SAICI relied on the same documents which it submitted to the State Court. Judge Duffy reached the same conclusion with respect to those documents as did the Appellate Division, and granted both motions (A. 485-87).

#### ARGUMENT

SAICI asserts that the documents which it submitted to the Appellate Division and Federal District Court establish that Adriana Bosurgi was not the owner of the Chemical custodian account but instead held that account in trust for SAICI. The District Court held that the assets in the Adriana Bosurgi account were in fact the assets of SAICI and thus no estate tax is owing.

If SAICI's position is sustained on this appeal then the District Court's dismissal of the action against Chemical as statutory executor of Adriana Bosurgi's estate



must also be affirmed. The Government, as it must, so concedes (Gov. Br. 4).

If the Government's tax claims are not dismissed, then the entire settlement fund should remain intact. Mr. Ginsberg's application that his fee be released from escrow regardless of the outcome of the tax litigation (Gins. Br. 2) should be denied. The District Court's order enjoining distribution of any part of the fund "pending final resolution (including appeals) of all tax claims" (A. 496) should be affirmed so that the fund remains available for satisfaction of any Federal tax claim against Chemical, as provided by the stipulation creating it (A. 449).

#### CONCLUSION

For the foregoing reasons, if the District Court's dismissal of the action against SAICI is affirmed, then its dismissal of the action against Chemical should also be affirmed with costs.

August 26, 1975

Respectfully submitted,

CRAVATH, SWAINE & MOORE,  
Attorneys for Defendant-Appellee  
Chemical Bank New York Trust Company,  
One Chase Manhattan Plaza,  
New York, N. Y. 10005

JOHN R. HUPPER,  
PETER E. CALAMARI,

Of Counsel.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-against-

LEONE BOSURGI, et al.,

Defendants-Appellees.

AFFIDAVIT OF  
SERVICE BY MAIL

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

The undersigned, being duly sworn, deposes and says:  
Deponent is over the age of 18 years, is not a party to this action  
and resides at 1906 B. Mather Way; Elkins Park, Pa.

On the 26<sup>th</sup> day of August 1975 deponent served the  
annexed BRIEF OF DEFENDANT-APPELLEE CHEMICAL BANK NEW YORK  
TRUST COMPANY  
upon (each of) the below listed attorney(s) by depositing ~~2~~<sup>2</sup> true ~~copy~~  
(copies) of the same securely enclosed in a postpaid, properly  
addressed wrapper in an official depository under the exclusive care  
and custody of the United States Postal Service within the State of  
New York.

Paul J. Curran, Esq.  
United States Attorney  
One St. Andrew's Plaza  
New York, N.Y. 10007

Benedict Ginsberg, Esq.  
475 Fifth Avenue  
New York, N.Y. 10017

Gainsburg, Gottlieb, Levitan & Cole  
122 East 42nd Street  
New York, N.Y.

Sworn to before me this 26<sup>th</sup> )  
day of August 19 75 )

*Christopher A. Wilburn*

CHRISTOPHER A. WILBURN  
Notary Public, State of New York  
No. 24-4266600  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 1977

*Marc Golden*  
MARC GOLDEN



